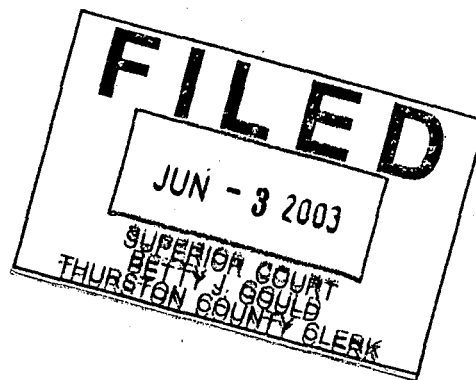


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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

PREMERA, a Washington non-profit  
miscellaneous corporation; and  
PREMERA BLUE CROSS, a Washington  
non-profit corporation,

Petitioners,

v.

MIKE KREIDLER, Insurance  
Commissioner for the State of  
Washington,

Respondent.

No. 03-2-00112-8

PETITIONER'S OPENING BRIEF

COPY

CDP 000462

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1 Act”), and the Holding Company Act for Health Care Service Contractors and  
2 Health Maintenance Organizations, chapter 48.31C RCW (the “Health Carrier  
3 Act”) (collectively, the “Holding Company Acts” or “Acts”). In place of the  
4 standards and procedures prescribed by the Acts and applicable regulations, the  
5 Third Order imposes requirements that are both open-ended and indeterminate as  
6 to the content of the Form A statement and the time frame for its review by the  
7 Commissioner. The effect of the Third Order is that more than seven months have  
8 elapsed since Premera filed its Form A statement and there is still no hearing  
9 schedule.

10 For these reasons, Premera urges the Court to declare the Third Order  
11 erroneous as a matter of law. The Court should reverse the Third Order and (1)  
12 declare that the Form A statement is deemed complete by operation of law; or, in  
13 the alternative (2) remand to the Commissioner with instructions to declare the  
14 Form A statement complete or identify with specificity additional information—if  
15 any—required by law to make the Form A statement complete. In addition, the  
16 Court should instruct the Commissioner to immediately set a date for the Form A  
17 hearing, to be held within the time frame required by statute.

#### 18 STATEMENT OF FACTS

19 On May 30, 2002, Premera notified the Commissioner of its desire to  
20 reorganize PREMERA, Premera Blue Cross, and their non-profit affiliates into for-  
21 profit business corporations. (R. 000165). In June and July 2002, Premera met  
22 with representatives of the Commissioner to explain the proposed reorganization,  
23 to discuss the process for review of the proposed reorganization, and to address  
24 other issues, such as the confidentiality of proprietary and trade secret information  
25 the Commissioner’s staff (“OIC Staff”) and its consultants were expected to

1 request in connection with their review of the Premera proposal. *Id.* On July 19,  
2 2002, the Office of the Insurance Commissioner gave Premera a work plan for  
3 reviewing the proposed reorganization. *Id.* The work plan designated December  
4 27, 2002, as the date for the Commissioner's decision on Premera's Form A  
5 statement. *Id.*

6 On September 17, 2002, Premera filed its Form A statement with the  
7 Commissioner.<sup>1</sup> (R. 00001-22). The Form A statement was supplemented on  
8 September 27, 2002. (R. 000031). On October 7, 2002, Deputy Commissioner  
9 James T. Odiorne sent an email to Premera identifying material missing from the  
10 Form A statement. (R. 000023). On October 25, 2002, Premera submitted the  
11 exhibits and information identified by Deputy Commissioner Odiorne. (R.  
12 000023-24). At the same time, Premera voluntarily agreed to extend the review  
13 period to a date "mutually agreed to by the states and Premera." (R. 000024).

14 On October 21, 2002, the Deputy Insurance Commissioner advised Premera  
15 that the OIC Staff intended to conduct a combined financial and market conduct  
16 examination pursuant to RCW 48.31C.070. (R. 000096). The next day, the OIC  
17 Staff's consultants submitted a comprehensive request for information to Premera,  
18 including extensive document requests for corporate and financial records; audit  
19 information; regulatory financial/actuarial information; tax, financial and actuarial  
20 information; claims/underwriting information; reinsurance; investment operations;  
21 and personnel and management information. (R. 000069-88; 000125). The  
22 requests sought documents dating back to 1933 comprising tens of thousands of  
23 pages. (R. 000094).

24 \_\_\_\_\_  
25 <sup>1</sup> Premera concurrently filed a Form A statement seeking approval from the Alaska  
Director of Insurance. (R. 000002).

1 On October 24, 2002, the Commissioner issued his *First Order: Case*  
2 *Management Order* ("First Order").<sup>2</sup> On November 1, 2002, Premera timely filed  
3 a "Motion for Partial Reconsideration and Clarification" ("Motion for  
4 Reconsideration"). (R. 00040-52). In its Motion for Reconsideration, Premera  
5 objected to those portions of the First Order that held the Form A statement would  
6 not be considered complete until the conclusion of the adjudicative hearing and the  
7 closing of the administrative record.<sup>3</sup> Specifically, Premera objected that the ruling  
8 was contrary to the express language of the Holding Company Acts and could  
9 wholly negate the legislative mandate requiring the Commissioner to render a  
10 decision within 60 days after the Form A Statement is complete. (R. 000041).

11 Meanwhile, Premera again assured the OIC of its "desire to cooperate with  
12 the OIC and other state officials in review of the filing, and to permit a full  
13 opportunity for all members of the community with questions or comments relating  
14 to the reorganization to submit their views to the OIC." (R. 000098). Accordingly,  
15 Premera proposed to extend the statutory review period to March 1, 2003. *Id.*

16 On November 13, 2002, the Commissioner issued the *Second Order: Order*  
17 *on Status Conference* ("Second Order"), directing the parties to submit status  
18 reports and setting a conference to discuss both Premera's responses to the OIC  
19 Staff's data requests and the time expected for the OIC Staff consultants to prepare  
20 their expert reports. (R. 000057-58). By November 15, 2002, Premera had  
21 assembled and made available more than 16,000 pages of materials in response to

22  
23 <sup>2</sup> The Commissioner's orders refer to the Form A statement as the "Application."  
(R. 000031, 32)

24 <sup>3</sup> The First Order stated: "The Application [*i.e.*, Premera's Form A statement] will  
25 not be considered complete until the adjudicative hearing has concluded and the  
administrative record is closed." (R. 000032).

1 these requests for information and had agreed to a "rolling production" of  
2 additional documents to the OIC Staff and its consultants. (R. 000094-95, 165-66).  
3 Premera also made available a data room for the OIC Staff and its consultants' on-  
4 site review of the requested information. (R. 000125). On November 20, 2002,  
5 after Premera's concerns about disclosure of highly confidential, non-public  
6 documents were addressed, Premera permitted the OIC Staff consultants to review  
7 and copy all documents, including confidential material, and provided a copy  
8 machine for the consultants' use in the data room. (R. 000126).

9 On November 19, 2002, the OIC Staff sent Premera a list of purported  
10 "Form A deficiencies." (R. 000091-93).<sup>4</sup> Rather than identifying the information  
11 missing from the Form A statement with specificity, the OIC Staff requested "[a]ll  
12 of the documents and information requested by the consultants." (R. 000093). The  
13 OIC Staff also noted: "[S]upplementary documents and their review may identify  
14 other documents or information necessary for our review." (R. 000091).

15 On November 22, 2002, the OIC Staff and Premera submitted the required  
16 status reports. In its report, Premera urged the Commissioner to set a schedule for  
17 pre-hearing milestones and a date for the hearing. (R. 000066). The OIC Staff,  
18 however, refused to commit to a schedule; and no schedule was set.

19 On December 23, 2002, following briefing and oral argument on Premera's  
20 Motion for Reconsideration, the Commissioner issued his Third Order denying  
21 Premera's Motion for Reconsideration. In the Third Order, the Commissioner  
22

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23 <sup>4</sup> The November 19, 2002, letter was not a declaration of incompleteness by the  
24 Commissioner. The First Order, dated October 24, 2002, explicitly created an *ex*  
25 *parte* wall that prohibited the OIC Staff from communicating with the  
Commissioner and established a "separation of functions" between the  
Commissioner and the OIC Staff. (R. 000033).

1 declined to schedule any deadlines for discovery or expert reports or to set a date  
2 for the adjudicative hearing on Premera's Form A statement. Premera timely filed  
3 its Petition for Judicial Review with this Court on January 21, 2003. The Office of  
4 the Insurance Commissioner filed the Administrative Record on April 15, 2003.

### 5 ARGUMENT

6 Premera seeks relief from the Third Order because it erroneously interprets  
7 and applies the law. RCW 34.05.570(3)(d). An agency's interpretation of a statute  
8 is reviewed *de novo*. *Harmon v. Dep't of Soc. & Health Servs.*, 134 Wn.2d 523,  
9 529, 951 P.2d 770 (1998). Because the Third Order is based upon an erroneous  
10 interpretation of the Holding Company Acts, the Court may substitute its  
11 interpretation of the law for that of the agency. *Overlake Fund v. Shoreline*  
12 *Hearings Bd.*, 90 Wn. App. 746, 754, 954 P.2d 304 (1998).

13 The Third Order should be reversed for the following reasons: (I) it  
14 disregards the statutory and regulatory standards for determining if a Form A  
15 statement is complete; (II) it fails to identify with specificity the information (if  
16 any) needed to complete Premera's Form A statement; (III) it fails to recognize  
17 that Premera's Form A Statement is deemed complete; (IV) it disregards the  
18 statutory 60-day deadline for review and approval of Premera's Form A statement;  
19 (V) it misconstrues the interaction of the Holding Company Acts and the  
20 Administrative Procedure Act; and (VI) it erroneously finds that the Commissioner  
21 has authority to disregard the Acts.<sup>5</sup>

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23  
24 <sup>5</sup> For the same reasons, the Third Order should be reversed based on RCW  
25 34.05.570(2)(b) and (c), which instruct courts to grant relief when an agency acts  
outside its authority or fails to follow mandatory procedures.



1 I. The Third Order Disregards the Statutory and Regulatory Standards for  
2 Determining Whether a Form A Statement Is Complete.

3 Because the completion of the Form A Statement triggers the 60-day time  
4 period within which the Commissioner must conclude the review and approval  
5 process, the date on which the Form A Statement is considered “complete” is of  
6 utmost importance. The completeness of a Form A statement is governed by the  
7 Holding Company Acts and their implementing regulations. The Holding  
8 Company Acts could not be clearer about the contents of a Form A statement. *See*  
9 RCW 48.31C.030(1) (“No person may acquire control of a domestic health carrier  
10 unless the person has filed with the commissioner . . . a statement containing the  
11 information required by this section. . . .” (emphasis added)); RCW  
12 48.31B.015(1) (“No person may enter into an agreement to merge with or  
13 otherwise to acquire control of a domestic insurer . . . unless . . . the person has  
14 filed with the commissioner . . . a statement containing the information required by  
15 this section. . . .” (emphasis added)). The information to be included in the  
16 “statement” is listed in RCW 48.31C.030(2)(a)-(k) and RCW 48.31B.015(2)(a)-(k).

17 The Holding Company Acts allow the Commissioner to require additional  
18 information “as necessary or appropriate for the protection of subscribers of the  
19 health carrier or in the public interest,” but only after promulgating a rule that  
20 expands the information required. RCW 48.31C.030(2)(l); *see also* RCW  
21 48.31B.015(2)(l). The Commissioner has, in fact, promulgated rules that specify  
22 the information required in a Form A statement. *See* WAC 284-18A-350, -910;  
23 WAC 284-18-360, -910. *See generally* WAC ch. 284-18A; WAC ch. 284-18. (A  
24 copy of the prescribed “Form A” is attached as Appendix A hereto.) In addition,  
25 the Commissioner’s rules also permit the person filing the Form A statement to

1 submit "such exhibits as it may desire in addition to those expressly required by the  
2 [Form A] statement." WAC 284-18A-330.

3 A. The Third Order Disregards the Statutory and Regulatory Provisions  
4 Governing the Contents of a Form A Statement.

5 The Third Order disregards the statutory and regulatory provisions for  
6 determining the contents of a Form A statement. The Commissioner ruled that the  
7 contents of the Form A statement must include the entire administrative record, and  
8 therefore the Form A statement would not be considered complete until the record  
9 is closed. (R. 000032). It is impossible to reconcile that ruling with the  
10 requirements of the statute and the implementing regulations. On their face, the  
11 Acts and the implementing regulations do not include the administrative record as a  
12 required part of the Form A statement.<sup>6</sup>

13 The Commissioner's conclusion that the Form A statement includes the  
14 administrative record is logically impossible. The subject matter of the hearing is  
15 the Form A statement, which itself is a part of the administrative record. The  
16 overall administrative record in an adjudicative proceeding consists of all  
17 evidence—including the Form A statement—and any other submissions to the  
18 agency. RCW 34.05.476; WAC 10-08-00; WAC 110-08-140. As the  
19 Commissioner has recognized no less than six times since 1998, the Form A  
20 statement becomes one part of the hearing record. *See, e.g., In re Charter Title Ins.*

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24 <sup>6</sup> The Commissioner's failure to identify a rational basis for departing from the  
25 regulations prescribing the contents of the Form A statement is itself grounds for  
granting Premera the relief it requests. RCW 34.05.570(3)(h).

1 Co., No. G01-11, WSR 01-08-006 (Mar. 21, 2001) at 2 ("The complete Form 'A'  
2 will be made part of the record of the hearing.").<sup>7</sup>

3 B. Discovery Is Not Part of the Form A Statement.  
4

5 The Third Order also concluded that the Form A statement would not be  
6 considered complete until Premera further explained the proposed reorganization  
7 "in light of any questions or problems raised by the OIC Staff and its experts." (R.  
8 000252). This interpretation flagrantly disregards the statutory and regulatory  
9 standards for determining whether the Form A statement is complete because the  
10 requests could, and in fact have, extended to matters far beyond those required by  
11 the Acts and their implementing regulations.<sup>8</sup> Moreover, the regulations that apply  
12 to Form A statements explicitly provide that information from the applicant "need  
13 be given only insofar as it is known or reasonably available to the person filing the  
14 statement." WAC 284-18A-320. "Questions or problems" that may be raised by  
15 OIC Staff in the future cannot possibly constitute information "reasonably  
16 available to the person filing the statement," *i.e.*, to Premera, at the time the  
17 statement is filed.

18  
19 <sup>7</sup> See also *In re Northern Life Ins. Co.*, No. G2000-27, WSR 00-14-018 (June 21,  
20 2000); *In re North West Life Assurance Co. of Am.*, No. G2000-57, WSR 00-22-  
21 067 (Oct. 27, 2000); *In re Unigard Security Ins. Co.*, No. G99-10, WSR 99-07-058  
(Mar. 15, 1999); *In re Cascade Nat'l Ins. Co.*, No. G98-39, WSR 98-18-105  
(Sept. 2, 1998); *In re Eagle Pacific Ins. Co.*, No. G98-23, WSR 98-12-108 (June 3,  
1998).

22 <sup>8</sup> For example, in his letter of Nov. 19, 2002, Deputy Commissioner Odiorne  
23 requested signed and dated copies of the pro forma agreements that were submitted  
24 as exhibits to the Form A Statement. As Mr. Odiorne acknowledged, such  
25 agreements cannot be executed until after the Commissioner has approved the  
reorganization. Mr. Odiorne stated: "We do understand that the documents must  
remain unsigned until final completion of the transaction and **therefore the Form  
A will be incomplete until that time.**" (R. 000025-26).

1 Because the Third Order ties the completion of the Form A statement to the  
2 “questions” and “problems” raised by the OIC Staff and its consultants, an  
3 applicant can never file a complete Form A statement as long as OIC Staff has  
4 continuing questions. In effect, any further data requests or discovery could  
5 perpetually foil prompt review and expeditious determination of an applicant’s  
6 Form A statement. To be sure, while the Commissioner can consider such  
7 “questions or problems” raised by the OIC Staff in his substantive review of the  
8 Form A statement, Premera’s responses do not become part of the Form A  
9 statement.<sup>9</sup>

10 II. The Commissioner’s Determination of Incompleteness Violates the Statute  
11 by Failing To Identify with Specificity the Information (If Any) Needed To  
12 Complete Premera’s Form A Statement.

13 In the Third Order, the Commissioner declared that Premera’s Form A  
14 statement is incomplete. (R. 000251). In doing so, the Commissioner was  
15 obligated to set forth “with specificity” what additional information was required to  
16 make the filing complete. RCW 48.31C.030(4).

17 The Third Order does not provide any specificity about purported  
18 deficiencies in the Form A statement, but instead adopts the erroneous position that  
19 the Form A statement is incomplete because it does not contain Premera’s  
20 responses to all future “questions or problems raised by the OIC Staff and its  
21 experts.” (R. 000252). The Third Order thus establishes a self-perpetuating and

22 <sup>9</sup> The Holding Company Acts permit the Commissioner to conduct an  
23 investigation, order production of books and records, and retain experts to assist in  
24 his review and investigation of the proposed transaction. RCW 48.31B.015(4)(c);  
25 RCW 48.31C.070(1)-(2); *see also* RCW 34.05.446; WAC 10-08-120. The  
documents and information produced, however, do not become part of the Form A  
statement.

1 potentially endless process whereby the applicant can never anticipate what is  
2 required to complete the Form A statement. The Commissioner could declare the  
3 Form A statement incomplete—even though it includes all the information required  
4 by statute and regulation—because it “may again have to be supplemented  
5 substantially through requests for additional information by the OIC.”  
6 (R. 000251).

7 The Third Order fails to inform Premera with specificity what additional  
8 information is needed and—even worse—makes it impossible for Premera’s  
9 Form A statement ever to be considered complete until every “question” and  
10 “problem” has been resolved to the satisfaction of the OIC Staff and its consultants.  
11 The Third Order thus raises the untenable possibility that Premera’s Form A  
12 statement will never be complete, nor will the 60-day period for determination ever  
13 be triggered.

14 III. Premera’s Form A Statement Should Be Deemed Complete.

15 A Form A statement submitted under the Health Carrier Act is “deemed  
16 complete” 60 days after its receipt unless the Commissioner declares the statement  
17 to be incomplete and requests additional information. RCW 48.31C.030(4). The  
18 purpose of “deemed complete” provisions, which are common in administrative  
19 statutes, is to avoid “protracted and unjustified delays in processing . . .  
20 applications.” *Riverwatch v. County of San Diego*, 91 Cal. Rptr. 2d 322, 328, 76  
21 Cal. App. 4th 128 (2000).<sup>10</sup> Unsurprisingly, then, the Health Carrier Act demands  
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23 <sup>10</sup> Similar automatic periods can be found in Washington statutes and rules. For  
24 example, contract forms of health care service contractors are “deemed approved”  
25 unless affirmatively disapproved by the Commissioner. RCW 48.44.070(2).  
Similarly, utility rates go into effect 30 days after filing unless the Washington

1 that any alleged incompleteness be addressed promptly and with specificity,  
2 according to a strict timeline. The Third Order defeats this essential purpose by  
3 failing to inform Premera with specificity what additional information is needed.<sup>11</sup>

4 In the absence of a valid determination of incompleteness based on  
5 permitted standards, and with the passage of time, Premera's Form A statement is  
6 deemed complete by operation of law under the Health Carrier Act. *See* RCW  
7 48.31C.030(4). The Commissioner declared that Premera's Form A statement was  
8 incomplete without identifying a statutorily-recognized basis for that  
9 determination. Instead of identifying with specificity any additional information  
10 required to render Premera's Form A statement complete, the Commissioner  
11 concluded it was incomplete based upon two grounds: (1) the Form A filing is not  
12 complete until the closing of the administrative record; and (2) the Form A will not  
13 be complete until Premera answers all the questions that have been or in the future  
14 might be asked by OIC Staff and its consultants. As discussed above, there is no  
15 legal basis for determining that a Form A statement is incomplete on these grounds.  
16 *See supra* pp. 8-11. The Third Order thus fails to articulate a legal basis to support  
17 a determination of incompleteness and, with the passage of time, Premera's Form  
18 A statement must be deemed complete.

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23 Utilities and Transportation Commission affirmatively suspends the rate. RCW  
80.28.060.

24 <sup>11</sup> The failure to comply with the statutory requirement violates not only RCW  
25 34.05.570(3)(b)-(d), but also RCW 34.05.570(3)(f), which authorizes courts to  
grant relief when an agency has not decided all issues requiring resolution.

1 IV. The Third Order Disregards the Statutory 60-Day Timeframe Within Which  
2 the Insurance Commissioner Must Hold the Adjudicative Hearing and  
3 Decide Whether To Approve the Change of Control.

4 The Holding Company Acts require the Commissioner to approve a  
5 transaction within 60 days after the Form A statement is complete. The  
6 adjudicative hearing, if any, must be held within that period.<sup>12</sup> The Health Carrier  
7 Act provides:

8 The commissioner shall approve an exchange or other acquisition of  
9 control referred to in this section within sixty days after he or she  
10 declares the statement filed under this section to be complete and if a  
11 hearing is requested by the commissioner or either party to the  
12 transaction, after holding a public hearing.

13 RCW 48.31C.030(4) (emphasis added). The Insurer Act similarly provides:

14 The commissioner shall approve an exchange or other acquisition of  
15 control referred to in this section within sixty days after he or she  
16 declares the statement filed under this section to be complete and  
17 after holding a public hearing.

18 RCW 48.31B.015(4)(b) (emphasis added). The Commissioner, however, adopted  
19 the interpretation that the review period begins to run after the adjudicative hearing  
20 on the Form A statement. (R. 000252-53). That reading of the Holding Company  
21 Acts is contrary to their plain language, their purpose, and their legislative history.

22 A. The Third Order Is Contrary to the Plain Language of the Statute.

23 If a statute is plain and unambiguous, its meaning must be derived from the  
24 language of the statute itself. *Harmon v. Dep't of Soc. & Health Servs.*, 134 Wn.2d  
25 523, 530 (1998). The plain language of the Holding Company Acts indicates that

<sup>12</sup> A public hearing is mandatory under the Insurer Act, but it is required under the Health Carrier Act only if requested by the Commissioner or either party to the transaction. RCW 48.31C.030(4); RCW 48.31B.015(4)(b).

1 the completion of the Form A statement starts a 60-day clock within which the  
2 Commissioner must hold a hearing and issue a ruling.

3 Indeed, the language of the Acts is so unmistakably clear that multiple  
4 Washington Insurance Commissioners, including Commissioner Kreidler, have  
5 repeatedly announced that the 60-day approval clock begins to run as soon as the  
6 Form A statement is complete and that the adjudicative hearing must occur during  
7 that 60-day timeframe. At least six reported insurance commissioner orders state:  
8 “The determination that the Form ‘A’ was complete begins the 60 day period  
9 within which the Insurance Commissioner must hold a hearing and decide whether  
10 to approve the change of control of the companies.” *In re Charter Title Ins. Corp.*,  
11 *supra* note 7, at 2 (emphasis added); *see also* rulings cited *supra* note 7.

12 In addition to contradicting the prior decisions of the Commissioner, the  
13 Third Order’s interpretation of the statute is contrary to the general principles of  
14 statutory construction. *See Harmon*, 134 Wn.2d at 530. Those general principles  
15 include the structure of the statute, “the basic rules of grammar,” and the meaning  
16 of related statutory provisions. *HUD v. Rucker*, 537 U.S. 125, 122 S. Ct. 1230,  
17 1233-34, 152 L.Ed.2d 258 (2002).<sup>13</sup> There is no dispute that the phrase “within  
18 sixty days” modifies the clause that immediately succeeds it, namely “after [the  
19 Commissioner] declares the statement filed under this section to be complete.” If  
20 the OIC Staff’s interpretation were accepted, the phrase “within sixty days” would  
21 also modify the distant phrase “after holding a public hearing.”

22  
23 <sup>13</sup> *See also Chowdhury v. INS*, 249 F.3d 970, 972 (9th Cir. 2001) (explaining that  
24 courts use “traditional tools of statutory interpretation” to determine whether there  
25 is any ambiguity in a statute), *citing Chevron, U.S.A., Inc. v. Natural Resources*  
*Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L.Ed.2d 694  
(1984).



1 Courts have long held that a modifier, such as the prepositional phrase  
2 “within sixty days,” relates only to the words that immediately precede or follow it,  
3 unless a contrary intention is clear from the statute. *See, e.g., State v. Wentz*, 110  
4 Wn. App. 70, 73-74, 38 P.3d 393 (2001); *In re Payless Cashways*, 215 B.R. 409,  
5 414-15 (W.D. Mo. 1997) (explaining that a modifier should be “tied” to the words  
6 that “appear[] just before or after the phrase.”). Here, there is no statutory signal  
7 that the phrase “within sixty days” is meant to modify the remote phrase “after  
8 holding a public hearing.” Consequently, the phrase “within sixty days” must  
9 modify only the words that immediately follow it.

10 The Third Order’s interpretation of the Acts would also impermissibly  
11 require words to be added to them, i.e., the Commissioner must make a decision  
12 within 60 days after he determines the statement to be complete or 60 days after a  
13 hearing, “whichever is later.” The Holding Company Acts, of course, are drafted  
14 differently, and had such a result been intended, the Legislature would have stated  
15 its intent explicitly. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396, 111 S. Ct.  
16 2354, 115 L.Ed.2d 348 (1991) (“[W]e are convinced that if Congress had such an  
17 intent, Congress would have made it explicit in the statute, or at least some of the  
18 Members would have identified or mentioned it at some point . . . .”); *see also In re*  
19 *Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) (holding that when the legislature  
20 “knows how to say something but chooses not to, its silence is controlling”).

21 B. The Third Order Defeats the Purpose of the Statutory 60-Day  
22 Deadlines.

23 The Third Order flouts the statutory requirement of review and approval of  
24 the Form A statement—including any adjudicatory hearing—within 60 days after it  
25 is deemed complete. The 60-day timeframe for the hearing and decision is

1 intended to ensure that the Commissioner conducts his review of the Form A  
2 statement promptly and does not prolong its investigation unnecessarily. The Third  
3 Order, however, fails to set a date for holding the adjudicative hearing or set any  
4 attainable target for the conclusion of the administrative proceeding, including  
5 establishment of discovery cutoffs or other deadlines for the OIC Staff's review. In  
6 short, the Third Order does not comply with the Commissioner's statutory duty to  
7 hold the adjudicatory hearing and to rule on Premera's Form A statement within 60  
8 days of its completion. Instead, the Third Order disregards the Commissioner's  
9 statutory duty by extending the time frame for making a decision indefinitely. (R.  
10 000252-254).

11 The proceedings to date demonstrate vividly the consequences of the  
12 Commissioner's decision to disregard the time frames in the Holding Company  
13 Acts. On October 7, 2002, Jim Odiorne—acting on behalf of the Commissioner  
14 prior to creation of the *ex parte* wall—listed a set of specific deficiencies that  
15 Premera was to address. (R. 000025-30, 124). On October 25, 2002, Premera  
16 provided exhibits and information necessary to complete the Form A requirements  
17 under the applicable Holding Company Act laws. (R. 00023-24). On November  
18 19, 2002, however, Mr. Odiorne—now acting on behalf of the OIC Staff—took the  
19 position that the Form A statement was “missing” documents and information  
20 requested by the consultants. The OIC Staff's letter further states that  
21 “supplementary documents and their review may identify other documents or  
22 information necessary for our review” which then would be required to supplement  
23 the Form A statement. (R. 000091). The November 19, 2002, letter thus  
24 perpetuated what could be a never-ending process.  
25

1 In the Third Order, the Commissioner ruled that Premera would need to  
2 respond to all “questions or problems raised by the OIC Staff and its experts,”  
3 regardless of how far in the future they are raised. (R. 000252). Over the many  
4 months since the initial data requests in October 2002, Premera has been asked to  
5 respond to new data requests, on an ongoing basis. The interpretation of the Acts  
6 adopted in the Third Order, therefore, has rendered the statutory time frames  
7 meaningless and must be rejected. *See City of Kent v. Lamb*, 1 Wn. App. 737, 740,  
8 463 P.2d 661 (1969) (explaining that statutes must be “construed to make the  
9 statute purposeful and meaningful” and “to give effect to all the language used”).

10 C. The Third Order Is Contrary to the Legislative History of the Holding  
11 Company Acts.

12 The legislative history further demonstrates that the Legislature intended for  
13 the hearing and approval to occur within 60 days of the Form A statement’s  
14 completion. In passing SHB 1855, portions of which became the Insurer Act, the  
15 Legislature announced that its intent was to amend the Washington Insurance Code  
16 to “conform to the [National Association of Insurance Commissioners’ (“NAIC”)]  
17 recommended financial regulatory standards and recommended regulatory  
18 statutes.” Final Bill Report, SHB 1855, Synopsis as Enacted, at 1 (July 25, 1993);  
19 *see also* House Bill Report, SHB 1855, at 2 (“The bill was developed over a two  
20 year period working very closely with the National Association of Insurance  
21 Commissioners . . .”). Similarly, the legislative history for the Health Carrier Act  
22 demonstrates the Legislature’s intent to extend key provisions of the Insurer Act to  
23 health care service contractors and HMOs. *See* House Bill Report, HB 1792 at 2;  
24 *id.* at 3 (recounting testimony from Commissioner Kreidler that the bill “is similar  
25 to the [Insurer Act]”).

1 Both the Insurer Act and the Health Carrier Act derive from the NAIC's  
2 Insurance Holding Company System Regulatory Act ("Model Act").<sup>14</sup> The Model  
3 Act places a premium on efficient and prompt review of a change in control.<sup>15</sup> It,  
4 like the Insurer Act and the Health Carrier Act, creates a 60-day review period in  
5 which the Commissioner must act. See Model Act § 3(D)(2), NAIC, Model Laws  
6 at 440-7 to 440-8; RCW 48.31B.015(4)(b); 48.31C.030(4). In fact, the Model Act  
7 requires a hearing no later than 30 days after the Form A statement is complete  
8 and, like the Washington Acts, requires that all discovery be complete not later  
9 than three days before commencement of the hearing. Model Act § 3(D)(2),  
10 NAIC, Model Laws at 440-8; RCW 48.31B.015(4)(b); RCW 48.31C.030(4).

11 The legislative history suggests that the deadlines established by the  
12 Holding Company Acts not only are mandatory, but also have constitutional  
13 implications. In 1983, the NAIC indicated that the Model Act was in danger of  
14 being struck down under the dormant Commerce Clause because "the burden on  
15 interstate commerce was excessive in relation to local interests which it served to  
16 protect." 1983-1 NAIC Proc. 94, 97 (citing *Edgar v. MITE Corp.*, 457 U.S. 624  
17 (1982)). The NAIC task force responsible for the Model Act therefore amended it  
18 to eliminate irrelevant considerations. The task force also considered the Illinois  
19 Insurance Department's suggestion that commissioners act to "clear up any  
20 confusion regarding the purposes of the act," by removing as much unnecessary

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21  
22 <sup>14</sup> See generally 3 NATIONAL ASS'N OF INS. COMM'RS, MODEL LAWS  
23 REGULATIONS AND GUIDELINES 440-31 to 440-32 (2002) [hereinafter "NAIC,  
24 Model Laws"] (explaining that RCW chapter 48.31B and Substitute House Bill  
25 1792, which became RCW chapter 48.31C, derive from the Model Act).

<sup>15</sup> The Model Act sets a short deadline for review and makes approval of a change  
in control mandatory absent specific findings. Model Act § 3(D)(1)-(2), NAIC,  
Model Laws at 440-7 to 440-8.

1 burden on the applicant as possible. 1983-1 NAIC Proc. 94, 104-05. Of particular  
2 relevance here, the Illinois Commissioner stated:

3 [R]egulators should be prepared to respond quickly when  
4 notifications of changes in control are filed. Consideration should be  
5 given to shortening the hearing process if it exceeds 30 days. And,  
6 the hearing should be made discretionary based on objective  
7 standards, rather than mandatory for every Form A statement.

8 1983-1 NAIC Proc. 94, 105. The Washington Legislature adopted these  
9 suggestions by imposing strict time limits on the process for approving transactions  
10 under the Holding Company Acts.

11 V. The Third Order Misconstrues the Interaction Between the Holding  
12 Company Acts and the Administrative Procedure Act.

13 As shown above, the Holding Company Acts plainly require that the  
14 Commissioner's review of Premera's proposed reorganization—including the  
15 administrative hearing—must be completed within the 60-day statutory period.  
16 *See supra* pp. 13-19. The Commissioner, however, reasoned that the  
17 Administrative Procedure Act ("APA") somehow alters these time frames. In  
18 particular, he hypothesized a scenario in which a potential intervener or the  
19 Commissioner did not seek an adjudicative hearing until 53 of the 60 days in the  
20 review period had passed. In that circumstance, he speculated, "an APA hearing  
21 with possible intervening participants, could not be accomplished by the sixtieth  
22 day, or at least could not be accomplished without severely prejudicing the rights  
23 of the parties, the rights of potential interveners, and the public interest." (R.  
24 000253).

25 This reasoning ignores the authority conferred upon the Commissioner by  
the APA to issue rulings and set deadlines to ensure that a hearing request will not  
occur at the eleventh hour. Under the APA, a presiding officer of an adjudicative

1 hearing has broad authority, including the right “to regulate the course of the  
2 proceedings, in conformity with applicable rules and the prehearing order.” RCW  
3 34.05.449(1). As the Third Order notes, that authority includes the ability to set a  
4 procedural schedule, including deadlines for determining whether a hearing is  
5 necessary, that complies with the statutory timeframes. Although the APA grants  
6 authority to the Commissioner to schedule and manage the hearing, nothing in the  
7 APA excuses the Commissioner from his duty to conduct the hearing within the  
8 statutory 60-day period.

9 VI. The Insurance Commissioner Is Not Free To Disregard the Statutory Time  
10 Frame.

11 In the Third Order, the Commissioner concluded that he need not follow the  
12 mandatory timeframe for a hearing because it is “directory” rather than mandatory.  
13 Third Order at 8-9. (R. 000253-254). The Commissioner reasoned that courts will  
14 not enforce statutory deadlines “where important public rights and interests are  
15 involved.” *Id.* That ruling misstates Washington law.

16 The use of the word “shall” indicates the Legislature’s intent to provide a  
17 mandatory schedule for the Commissioner’s review of the Form A statement.<sup>16</sup> *See*  
18 *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 687 n.2, 649 P.2d 103 (1982)  
19 (statute indicated mandatory nature through use of “shall” and provisions  
20 governing extensions of time). *See generally* *Erection Co. v. Dep’t of Labor &*

21 <sup>16</sup> The detailed provisions setting forth other mandatory time limits demonstrate the  
22 Legislature’s commitment to expeditious consideration of an application under the  
23 Holding Company Acts. *See, e.g.*, RCW 48.31B.015(2)(i) (where material change  
24 occurs in the statement filed with the commissioner, amendment setting forth such  
25 change “must be filed with the commissioner” within two business days after  
person learns of the change); RCW 48.31B.015(4)(b); RCW 48.31C.030(4)  
(discovery proceedings must be concluded not later than three days before  
commencement of public hearing).

1 *Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993) (use of the word “shall” in a  
2 statute imposes a mandatory requirement absent legislative intent to the contrary).  
3 The Acts do not confer discretion upon the Commissioner to interpret the plain  
4 language of the statute in a manner that alters or amends this timeframe. *See In re*  
5 *George*, 90 Wn.2d 90, 97, 579 P.2d 354 (1978) (“We are committed to the  
6 principle that an administrative agency may not, by interpretation, amend or alter  
7 the statutes under which it functions.”).

8 While the Commissioner has discretion to manage this administrative  
9 proceeding, he may not use that discretion to ignore the statutory requirement to  
10 review and approve a Form A statement within the 60-day timeframe. “The fact  
11 that an agency has discretion over the manner in which it carries out its statutorily  
12 prescribed duties does not mean that the agency has the discretion to refuse to carry  
13 out those duties.” *Rios v. Wash Dep’t of Labor & Indus.*, 145 Wn.2d 483, 510,  
14 39 P.3d 961 (2002) (Alexander, C.J., concurring). To the contrary, the agency’s  
15 discretion “is limited to the terms of the statutory scheme that provides the agency  
16 its authority.” *Id.* (emphasis added).

17 The Supreme Court’s opinion in *Norco Construction* is instructive. There, a  
18 developer filed a writ of mandamus to compel the county to act on a preliminary  
19 plat application. The application conflicted with a proposed King County  
20 Comprehensive Plan but conformed to the existing plan. Action on the plat was  
21 postponed indefinitely by the county, in violation of a statute requiring a  
22 determination within 90 days of the filing of an application. The trial court granted  
23 the writ of mandamus and directed the County to consider the application on its  
24 next agenda. The Court of Appeals affirmed, and the Supreme Court did as well,  
25 stating that mandamus was proper “to order the Council to act on the preliminary

1 plat.” 97 Wn.2d at 682. The Court reasoned that the 90-day limitation at issue was  
2 “intended to forestall unwarranted delay,” *id.* at 687, and that the County “was  
3 required to act, absent other lawful reasons,” *id.* at 686. It therefore concluded that  
4 the “County’s discretion [was] limited by the procedural requirements of the  
5 statute.” *Id.* at 688.

6 The 60-day period for review and hearing here, like the 90-day limitation at  
7 issue in *Norco*, is intended to forestall unwarranted delay. The Commissioner  
8 cannot escape the binding force of the law by characterizing the 60-day deadline as  
9 “directory” rather than mandatory. Indeed, it is well established that “[t]o hold that  
10 a provision is directory rather than mandatory, does not mean that it is optional—to  
11 be ignored at will. Both mandatory and directory provisions of the legislature are  
12 meant to be followed.” *Borough of Pleasant Hills v. Carroll*, 182 Pa. Super. 102,  
13 106, 125 A.2d 466, 469 (1956).<sup>17</sup> The Commissioner must follow the terms of the  
14 Holding Company Acts.

### 15 CONCLUSION

16 The Holding Company Acts contain specific provisions governing the  
17 contents of Premera’s Form A statement and the process for reviewing it. Those  
18 provisions establish a process for a thorough and prompt review of the Form A  
19 statement. Premera has repeatedly announced that it is committed to a procedure

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20 <sup>17</sup> If an agency fails to comply with a “directory” deadline, the burden shifts to the  
21 agency to demonstrate substantial compliance with the requirements and purposes  
22 of the statute in order to determine the validity of the agency action. *See City of*  
23 *Yakutat v. Ryman*, 654 P.2d 785, 791 (Alaska 1982) (in action by taxpayer against  
24 city, court determined that violation of deadlines for assessment and levy of taxes  
25 shifted burden to taxing authority to demonstrate substantial compliance) (citing  
*Allen v. Pub. Util. Dist. No. 1 of Thurston County*, 55 Wn.2d 226, 233, 347 P.2d  
539, 543 (1959) (failure to substantially comply with statute pertaining to method  
in which a district may raise revenue by levy of an annual tax rendered proposed  
levy tax invalid)).

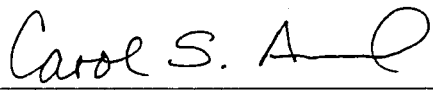


1 that ensures that all interested parties have a full opportunity to express their views  
2 regarding the proposed reorganization and that there is sufficient time to address all  
3 relevant considerations.

4 The Third Order, however, permits a never-ending process that directly  
5 violates the terms of the Holding Company Acts. The Court should therefore  
6 reverse the Third Order and (1) declare that the Form A statement is deemed  
7 complete by operation of law; or (2) in the alternative, remand to the  
8 Commissioner with instructions to declare the Form A statement complete or  
9 identify with specificity additional information—if any—required by law to make  
10 the Form A statement complete. In addition, the Court should instruct the  
11 Commissioner to immediately set a date for the Form A hearing to be held within  
12 the time frame required by statute.

13 DATED this 2nd day of June, 2003.

14  
15 PRESTON GATES & ELLIS LLP

16  
17 By   
18 Carol S. Arnold, WSBA # 18474  
19 Robert B. Mitchell, WSBA #10874  
20 Attorneys for PREMERA and Premera  
21 Blue Cross  
22  
23  
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## **Appendix A**

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**WAC 284-18A-910 Form A.**

## FORM A

STATEMENT REGARDING THE  
ACQUISITION OF CONTROL OF A DOMESTIC HEALTH CARRIER

Name of Domestic Health Carrier

BY

Name of Acquiring Person (Applicant)

Filed with the Insurance Commissioner of the State of Washington

Dated: .

Name, Title, Address, and Telephone Number of Individual to Whom Notices and Correspondence Concerning this Statement Should be Addressed:

**ITEM 1. HEALTH CARRIER AND METHOD OF ACQUISITION**

State the name and address of the domestic health carrier to which this application relates and a brief description of how control is to be acquired.

**ITEM 2. IDENTITY AND BACKGROUND OF THE APPLICANT**

(a) State the name and address of the applicant seeking to acquire control over the health carrier.

(b) If the applicant is not an individual, state the nature of its business operations for the past five years or for such lesser period as such person and any predecessors have been in existence. Briefly describe the business intended to be done by the applicant and the applicant's subsidiaries.

(c) Furnish a chart or listing clearly presenting the identities of the inter-relationships among the applicant and all affiliates of the applicant. No affiliate need be identified if its total assets are equal to less than one-half of one percent of the total assets of the ultimate controlling person affiliated with the applicant. Indicate in such chart or listing the percentage of voting securities of each such person which is owned or controlled by the applicant or by any other such person. If control of any person is maintained other than by the ownership or control of voting securities, indicate the basis of such control. As to each person specified in such chart or listing, indicate the type of organization (e.g. corporation, trust, partnership) and the state or other jurisdiction of domicile. If court proceedings involving a reorganization or liquidation are pending with respect to any such person, indicate which person, and set forth the title of the court, nature of proceedings and the date when commenced.

**ITEM 3. IDENTITY AND BACKGROUND OF INDIVIDUALS ASSOCIATED WITH THE**

**APPLICANT**

Furnish biographical information for (1) the applicant if (s)he is an individual or (2) all persons who are directors, executive officers or owners of ten percent or more of the voting securities of the applicant if the applicant is not an individual. Unless otherwise directed by the commissioner, the biographical information shall contain the information required by and be submitted in the format of the current NAIC Biographical Affidavit form.

**ITEM 4. NATURE, SOURCE AND AMOUNT OF CONSIDERATION**

(a) Describe the nature, source and amount of funds or other considerations used or to be used in effecting the merger or other acquisition of control. If any part of the same is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding or trading securities, furnish a description of the transaction, the names of the parties thereto, the relationship, if any, between the borrower and the lender, the amounts borrowed or to be borrowed, and copies of all agreements, promissory notes and security arrangements relating thereto.

(b) Explain the criteria used in determining the nature and amount of such consideration.

(c) If the source of the consideration is a loan made in the lender's ordinary course of business and if the applicant wishes the identity of the lender to remain confidential, he or she must specifically request that the identity be kept confidential.

**ITEM 5. FUTURE PLANS OF HEALTH CARRIER**

Describe any plans or proposals which the applicant may have to declare an extraordinary dividend, to liquidate such health carrier, to sell its assets to or merge it with any person or persons or to make any other material change in its business operations or corporate structure or management.

**ITEM 6. NONPROFIT HEALTH CARRIERS**

If the health carrier or person controlling the health carrier being acquired is a nonprofit corporation:

(a) Describe who the members of the corporation or person controlling the health carrier are and how they become or are selected as members of the corporation and how this may change as a result of the acquisition.

(b) Describe who has the authority or power to elect or appoint the board of directors, trustees or other governing body of the health carrier or person controlling the health carrier and how this may change as a result of the acquisition.

**ITEM 7. FOR-PROFIT HEALTH CARRIERS**

If the health carrier being acquired is a for-profit person:

(a) State the number of shares of the health carrier's voting securities which the applicant, its affiliates and any person listed in Item 3 plan to acquire, and the terms of the offer, request, invitation, agreement or acquisition, and a statement as to the method by which the fairness of the proposal was determined.

(b) State the amount of each class of any voting security of the health carrier which is beneficially owned or concerning which there is a right to acquire beneficial ownership by the applicant, its affiliates or any person listed in Item 3.

(c) Give a full description of any contracts, arrangements or understandings with respect to any voting security of the health carrier in which the applicant, its affiliates or any person listed in Item 3 is involved, including, but not limited to, transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits,

division of losses or profits, or the giving or withholding of proxies. Such description shall identify the persons with whom such contracts, arrangements or understandings have been entered into.

(d) Describe any purchases of any voting securities of the health carrier by the applicant, its affiliates or any person listed in Item 3 during the twelve calendar months preceding the filing of this statement. Include in such description the dates of purchase, the names of the purchasers, and the consideration paid or agreed to be paid therefor. State whether any such shares so purchased are hypothecated.

(e) Describe any recommendations to purchase any voting security of the health carrier made by the applicant, its affiliates or any person listed in Item 3, or by anyone based upon interviews or at the suggestion of the applicant, its affiliates or any person listed in Item 3 during the twelve calendar months preceding the filing of this statement.

(f) Describe the terms of any agreement, contract or understanding made with any broker-dealer as to solicitation of voting securities of the health carrier for tender and the amount of any fees, commissions or other compensation to be paid to broker-dealers with regard thereto.

#### ITEM 8. FINANCIAL STATEMENTS AND EXHIBITS

(a) Financial statements and exhibits shall be attached to this statement as an appendix, but list under this item the financial statements and exhibits so attached.

(b) The financial statements shall include the annual financial statements of the persons identified in Item 2(c) for the preceding five fiscal years (or for such lesser period as such applicant and its affiliates and any predecessors have been in existence), and similar information covering the period from the end of such person's last fiscal year, if such information is available. Such statements may be prepared on either an individual basis, or, unless the commissioner otherwise requires, on a consolidated basis if such consolidated statements are prepared in the usual course of business.

The annual financial statements of the applicant shall be accompanied by the certificate of an independent public accountant to the effect that such statements present fairly the financial position of the applicant and the results of its operations for the year then ended, in conformity with generally accepted accounting principles. If the applicant is a health carrier or an insurer, the annual financial statements of the applicant shall be accompanied by the certificate of an independent public accountant to the effect that such statements present fairly the financial position of the applicant and the results of its operations for the year then ended, in conformity with statutory accounting principles as set forth in Titles 48 RCW and 284 WAC.

(c) File as exhibits copies of all tender offers for, requests or invitations for, tenders of, exchange offers for, and agreements to acquire or exchange any voting securities of the health carrier and (if distributed) of additional soliciting material relating thereto, any proposed employment, consultation, advisory or management contracts concerning the health carrier, annual reports to the stockholders of the health carrier and the applicant for the last two fiscal years, and any additional documents or papers required by Form A or WAC 284-18A-300 or 284-18A-320.

#### ITEM 9. SIGNATURE AND CERTIFICATION

Signature and certification required as follows:

##### SIGNATURE

Pursuant to the requirements of RCW 48.31C.030 has caused this application to be duly signed on its behalf in the City of and State of on the day of , .

(SEAL) \_\_\_\_\_

Name of Applicant

BY \_\_\_\_\_

(Name)

(Title)

Attest:

(Signature of Officer)

---

(Title)

**CERTIFICATION**

The undersigned deposes and says that (s)he has duly executed the attached application dated , for and on behalf of (Name of Applicant); that (s)he is the (Title of Officer) of such company and that (s)he is authorized to execute and file such instrument. Deponent further says that (s)he is familiar with such instrument and the contents, and that the facts therein set forth are true to the best of his/her knowledge, information and belief.

(Signature)

(Type or print name beneath)

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[Statutory Authority: RCW 48.02.060, 48.44.050, 48.46.200, chapter 48.31C RCW. 02-21-123 (Matter No. R 2001-08), § 284-18A-910, filed 10/23/02, effective 11/23/02.]